

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ABINGDON DIVISION**

By: James P. Jones
United States District Judge

¹ Jo Anne B. Barnhart became Commissioner of Social Security, effective November 9, 2001. Under Fed. R. Civ. P. 25(d)(1) and 42 U.S.C.A. § 405(g) (West 1991 & Supp. 2002), Jo Anne B. Barnhart is automatically substituted as the defendant in this action.

42 U.S.C.A. §§ 401-433, 1381-1383d (West 1991, 1992 & Supp. 2002) (“Act”).² Jurisdiction of this court exists pursuant to 42 U.S.C.A. §§ 405(g) and 1383(c)(3).

By judgment entered June 8, 2000, this case was remanded to the Commissioner for further administrative proceedings, pursuant to the fourth sentence of 42 U.S.C.A. § 405(g). Upon remand, the plaintiff was successful in obtaining a determination of disability. He received an award of past due benefits under title II (DIB) in the amount of \$30,673, and an award of past due benefits under title XVI (SSI) in the amount of \$19,640.22. The Commissioner withheld twenty-five percent of the plaintiff’s title II past due benefits award, or \$7,668.25, for payment toward any attorney’s fee that might be awarded.

The plaintiff had a written fee agreement with his attorney providing for a contingent fee of twenty-five percent of “all back pay benefits which me [sic] or my dependents shall be entitled to, to include Social Security Disability and Supplemental Security Income back pay benefits.”

² “Title II is an insurance program. Enacted in 1935, it provides old-age, survivor, and disability benefits to insured individuals irrespective of financial need. Title XVI is a welfare program. Enacted in 1972, it provides SSI benefits to financially needy individuals who are aged, blind, or disabled regardless of their insured status.” *Bowen v. Galbreath*, 485 U.S. 74, 75 (1988) (citations omitted). Claimants sometimes have, as here, concurrent title II and title XVI claims.

The attorney filed a fee petition with the Social Security Administration (“SSA”) on November 8, 2002, and an administrative law judge awarded a fee of \$9,000 for services rendered before the SSA in both the title II and title XVI claims.³

Thereafter, the attorney for the plaintiff filed the present Petition, seeking approval of an additional fee of \$3,578.30, representing the difference between the amount of fee approved by the SSA and twenty-five percent of the total past due benefits for both title II and title XVI of \$50,313.20.

The Commissioner objects to any award of attorney’s fee by this court on the ground that the plaintiff’s attorney has already been awarded twenty-five percent of past due benefits because the SSA offset the plaintiff’s title II award by \$21,740.22 (the amount received by the plaintiff under title XVI), thus reducing his total past due benefits by that amount.⁴

³ This court does not have subject matter jurisdiction to review the reasonableness of the award of attorneys’ fees by the Social Security Administration. *See Smith v. Bowen*, 656 F. Supp. 648, 651 (W.D. Va. 1987), *aff’d*, No. 87-2075, 1988 WL 21212 (4th Cir. Mar. 8, 1988) (unpublished).

⁴ *See* 42 U.S.C.A. § 1320a-6 (West 1991 & Supp. 2002) (requiring reduction in title II benefits “by an amount equal to so much of the [title XVI] benefits . . .”). The amount offset (\$21,740.22) was greater than the amount of past due SSI benefits awarded (\$19,640.22) because the plaintiff began receiving title XVI benefits several months before title II benefits.

II

In proceedings under title II of the Act, the court is authorized to determine and allow a “reasonable [attorney’s] fee . . . not in excess of 25 percent of the total of the past-due benefits to which the claimant is entitled” 42 U.S.C.A. § 406(b)(1)(A) (West Supp. 2002). The Fourth Circuit, construing the legislative history, has held that the twenty-five percent limit includes any separate fee authorized by the Commissioner for services rendered in the administrative proceedings. *See Morris v. Social Sec. Admin.*, 689 F.2d 495, 497 (4th Cir. 1982). The law does not provide for approval of an attorney’s fee in title XVI cases. *See Lambert v. Apfel*, 89 F. Supp. 2d 748, 751 (W.D. Va. 2000). Accordingly, since the plaintiff’s attorney has already received an award equal to twenty-five percent of the past due title II benefits, no further award by this court is permitted.

III

For the foregoing reasons, judgment will be entered denying the Petition for approval of an attorney’s fee.

DATED: April 9, 2003

United States District Judge